UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

TERESA A. O'CONNOR, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C03-3081-MWB **REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Teresa A. O'Connor ("O'Connor") appeals a decision by an administrative law judge ("ALJ") denying her applications for Title XVI supplemental security income ("SSI") and Title II disability insurance ("DI") benefits. O'Connor claims the ALJ erred in numerous respects, including determining O'Connor's residual functional capacity based on irrelevant medical evidence, failing to evaluate all of the evidence, formulating hypothetical questions that did not include all of her limitations, and improperly determining that her subjective complaints were not credible. (*See* Doc. No. 8, pp. 10-17))

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On June 17, 1999, O'Connor protectively filed an application for SSI benefits. (*See* R. 18; *see also* R. 7[1]) On June 23, 1999, O'Connor filed an application for DI benefits, alleging a disability onset date of December 28, 1998. (R. 67-69)[2] O'Connor alleged she was disabled due to "chronic back pain, manic depressive, multiple personalities, epilep[tic] seizures, [and] mini-strokes," which she claimed limited her physical and

[1]O'Connor's SSI application, initial denial by the State agency and notice of same, and reconsideration denial and notice of same, all are missing from the record. (*See* R. i, 1, 7)

[2]O'Connor initially filed applications for DI and SSI benefits on January 23, 1996. Both applications were denied in August 1996, and O'Connor did not request reconsideration, making the ALJ's decision on those applications the final decisions of the Commissioner. (*See* R. 18; 63-66) Although the record contains documentation relating to these prior applications, including medical records, the present appeal relates only to O'Connor's 1999 applications for benefits.

mental activities and prevented her from working full time. (*See* R. 108) Both applications were denied initially on September 1, 1999 (R. 7, 41, 48-53), and at the reconsideration stage in early May 2000.[3] (R. 7, 42, 56-60) On July 3, 2002, O'Connor requested a hearing (R. 61), and a hearing was held before ALJ Andrew T. Palestini on June 22, 2001, in West Des Moines, Iowa.[4] (R. 493-537) Attorney Blake Parker represented O'Connor at the hearing. O'Connor and a friend, Diana Holtzkoff, testified at the hearing, as did Vocational Expert ("VE") Elizabeth M. Albrecht.

On September 14, 2001, the ALJ ruled O'Connor was not entitled to benefits. (R. 15-28) On July 18, 2003, the Appeals Council of the Social Security Administration denied O'Connor's request for review (R. 9-13), making the ALJ's decision the final decision of the Commissioner.

O'Connor filed a timely Complaint in this court on September 22, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 1) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of O'Connor's claim. O'Connor filed a brief supporting her claim on January 26, 2004. (Doc. No. 8)

On March 17, 2004, the Commissioner filed a motion to remand the case pursuant to sentence four of 42 U.S.C. § 405(g). (Doc. No. 9) On March 23, 2004, the Commissioner filed an unopposed motion to extend the deadline for her responsive brief until after the court had ruled on the motion for remand. (Doc. No. 10) The court denied the motion, pointing out that a sentence four remand requires a plenary review of the

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[3]The record is somewhat unclear as to the precise dates of the reconsideration determinations.

[4]O'Connor, her attorney, and her witness participated in the hearing by video conference from a remote site in Fort Dodge, Iowa. (*See* R. 495)

record, and directed the Commissioner to file her brief by April 2, 2004. (Doc. No. 11) The Commissioner filed her responsive brief on April 1, 2004. (Doc. No. 12). O'Connor filed a reply brief on April 6, 2004. (Doc. No. 13) The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of O'Connor's claim for benefits.

B. Factual Background

1. Introductory facts and O'Connor's testimony

At the time of the hearing, O'Connor was 37 years old, unmarried, and living in a small two-bedroom house in Pocahontas, Iowa. (R. 497, 517) She graduated from high school in 1983. (R. 514) She stated she was in a program for students with learning disabilities beginning in the seventh grade. She also has taken some college courses. (R. 497) She testified she has some problems reading, and sometimes her friend Diana Holtzkoff helps her read and explains things to her. (R. 497-98) O'Connor also stated she usually prints because she can barely write in cursive, and she described both her printing and her cursive writing as very difficult to read. (R. 498)

O'Connor's first job was a part-time, summer job when she was in high school. She did light janitorial work at the school in the evenings. She was not required to do any heavy cleaning or run any machines. (R. 498-99, 513) Also while in high school, she worked in housekeeping at a hotel, where she made beds and did some cleaning but did not run any vacuum cleaners or do heavy work. She was unable to keep the job for long because she was having trouble with her back. (R. 499)

O'Connor next did live-in home care for adults. She would live in the person's home full time and work six days a week, doing light cleaning, cooking, and some chauffeuring. She did this for about four different people in succession. (R. 500)

A couple of years after high school, O'Connor became a Certified Nursing Assistant ("CNA"), and she worked as a nurse's aide in several nursing homes. (R. 501, 514) She stated the work "was very difficult because that involved lifting patients, feeding patients, and just general care of the patients." (R. 501)

In 1995, 1996, and 1997, O'Connor worked as a dishwasher at a local restaurant. She worked from 4:00 p.m. to around 10:30 or 11:00 p.m., four to five nights a week. (R. 522-24, 526) The record is unclear as to whether this dishwashing job was in between nursing home jobs, or simultaneously with her work in nursing homes.

O'Connor had shoulder surgery in 1996, and when she returned to work at a nursing home, the administrator switched her from doing nurse's aide work to being an environmental aide, which was lighter work that primarily involved filling water pitchers, passing out glasses, and washing wheel chairs. (*Id.*; R. 514) According to O'Connor, the switch in her job responsibilities was due to the physical problems she was experiencing while doing the nurse's aide work. (*Id.*) She continued to do some CNA work, but stated "it was mainly people who could take care of themselves that just mainly needed somebody to watch them to make sure they went to the bathroom okay and could get back to their rooms. No lifting or heavy stuff." (R. 514)

O'Connor stated when a new administrator and director took over at the nursing home around the first part of August 2000, she was pressured to return to doing regular CNA-type work. (R. 514) She was fired from the job at about the same time over "some kind of a disagreement of something." (R. 501; *see* R. 192)

After she was fired from her nursing home job, O'Connor got a job as a dishwasher in a small, family-owned restaurant in Pocahontas. She was still working at this job as of the time of the hearing. She stated she worked three nights a week, from 6:00 p.m. until around 11:00 p.m. or sometimes midnight. Besides just washing the dishes, she also had

to put the dishes away, which she usually did alone, unless the restaurant got busy, and then she got some help. (R. 501-02) O'Connor testified someone else always did all of the lifting, including lifting dishes into the cupboards. She stated, "Even if I drop a spoon or fork on the floor, I always have somebody to bend over and pick it up for me." (R. 502)

According to O'Connor, the restaurant's owners are very helpful to her. They allow her to leave early if she is having too much pain to continue working, and they offer to give her a ride home. (R. 502)

Describing the problems that keep her from working, O'Connor stated as follows:

> I have some very bad problems in the lower back, some spasm in the right hip and the right knee. And I have quite a bit of trouble with my right shoulder that also prevents me from doing too much with my right hand. But I am right handed and that really makes things difficult. And I also have trouble with some epileptic seizures.

(*Id.*)

Regarding her back problems, O'Connor stated she has pain that affects her if she sits or stands too long, or if she bends over. (R. 503) She gave the following example:

> [W]hen I'm doing housework at home and there's something on the floor that I need to pick [up] before I can run the vacuum cleaner, if I don't have a helper there, I have to literally sit on the floor and scoot myself across the floor picking up items because I just can't bend over and pick them up.

(*Id.*) She stated the pain "feels like some kind of monster in my back just twisting and twisting my back and it feels like it's pulling it up from the knee and into the hip." (*Id.*) O'Connor stated she receives treatment for her back and shoulder pain at the Pain Clinic in Iowa City. They have prescribed exercises, some medications, a TENS unit, and

physical therapy, but O'Connor opined it would be more beneficial for her to get physical therapy in Pocahontas than in Iowa City. (R. 507-08) She stated she wears the TENS unit most of the time, but she leaves it off three or four days a month because the patches cause her to break out in a rash. (R. 508) O'Connor stated she takes pain medication daily for her back pain, but the medication only helps a little bit. (R. 508-09)

Regarding her shoulder, O'Connor stated she had undergone shoulder surgery. According to O'Connor, at her most recent checkup, doctors told her "it looks like that the bone is broke a little bit in the shoulder and it's cutting into the rotary cuff." (R. 503) She noted that at times, her shoulder hurts all the way down her arm and into her fingers. (*Id.*)

Regarding her seizures, O'Connor stated her most recent seizure prior to the hearing was on May 10, 2001. She described the incident as follows:

> Diana and I had been in Fort Dodge. We got to Pocahontas and Diana said you look tired. Why don't you take a nap here at my place because she was concerned for me. And I said no, I'll be all right. And I went home and lay [sic] down on the bed. I was lying at the head end of the bed and something woke me up. I was feeling cold and somehow I was lying at the foot end of the bed and I had bit my tongue And the first thing I did was I went to the phone and called Diana and she came over and got me and took me back to her place.

(R. 504) O'Connor opined the seizure was a grand mal seizure because she started out at the head of the bed and ended up at the foot of the bed, and she had bitten her tongue with her teeth. She stated her tongue took quite awhile to heal. (*Id.*)

According to O'Connor, the May 2001 seizure was typical of some of her seizures, but she also has seizures that are less severe. She described her other type of seizures as follows:

> I'll be sitting somewhere or doing something and all of a sudden I'll get a funny feeling. And my eyes will roll back in my head and I'll get dizzy. And the best thing for me to do is just sleep. I fall asleep and then when I wake up I have a hard time remembering. I do not know specifically myself what actually all happens during a seizure. . . . Some people have suggested videotaping one if they ever could, to show me what happens. And truthfully, I'm too scared to know.

(R. 504-05) O'Connor stated that after she has a seizure, she feels "totally worn out" and like she has been "beat up by six guys." (R. 505) After a seizure, she tries to relax and sleep. (*Id.*)

O'Connor testified she believes she has a seizure about once every six months. However, she noted her friend Diana believes O'Connor is having seizures more frequently than she realizes, perhaps as often as once or twice a week. (R. 515) In August 2000, O'Connor talked to the doctors in Iowa City about Diana's observation that O'Connor was having weekly seizures. She stated the doctors in Iowa City increased her seizure medication somewhat in August 2000, and O'Connor believed the increase had been beneficial to her. (R. 515-16)

O'Connor's attorney noted there was some indication in her medical records that she sometimes did not take her seizure medications as directed. O'Connor replied, "Oh, no. I take my medication." (*Id.*) She stated she has been compliant in taking her medications since around 1996, when she first found out she was having "actual seizures." She takes Depakote 500 mg., three times daily. The prescribing doctor is from the University of Iowa Hospitals and Clinics, and she gets the medication through the Iowa City Pharmacy. The State of Iowa pays for her medications. (R. 505-06)

O'Connor has a driver's license that contains a restriction for eyeglasses. She testified she drives almost daily. She stated doctors in Iowa City have told her driving is

not recommended because of her seizures, but the nurse practitioner she sees on a regular basis in Pocahontas told her that driving would not be a problem if she stayed in town "and could tell when the seizures were coming on." (R. 497, 516) O'Connor testified that before a seizure, she will get "kind of [a] funny feeling." (R. 516) She stated she restricts her driving to her hometown of Pocahontas because she feels safer driving there, and she feels unsafe driving elsewhere because she might have a seizure. (R. 497)

O'Connor stated her primary health care provider is Tonja S. Petersen-Anderson, a Registered Nurse Practitioner in Pocahontas.[5] She stated Ms. Anderson was not able to provide her with much care "because of low insurance and very little resources," and Ms. Anderson primarily schedules appointments for O'Connor with doctors in Iowa City. (R. 506) O'Connor stated Ms. Anderson completed a Residual Functional Capacity for her. (R. 506) She had been seeing Ms. Anderson since 1996 or 1997, but at the time of the hearing, she had not seen Ms. Anderson for about six months due to lack of funds. (R. 507, 515) O'Connor thought she had told Ms. Anderson about her friend's opinion that O'Connor was having weekly seizures, but O'Connor noted she sometimes has problems with her memory. (R. 515-16)

O'Connor stated she has problems with depression, which makes her feel "sad, confused, [and] lonely." (R. 509) She takes 100 mg per day of Zoloft for depression. She was being treated by Dr. Okoli, who prescribed the Zoloft, but O'Connor sated he had moved his office to Humboldt or Fort Dodge, and she was not able to see him anymore due to gas prices and her concern about driving outside of Pocahontas. (R. 509-10) She also was treated at the Seasons Center, which had a satellite office in Pocahontas. (R. 510)

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[5] Although O'Connor initially stated Ms. Anderson was her "primary physician," the court notes Ms. Anderson actually is a Registered Nurse Practitioner with Trimark Physicians Group. (*See, e.g.*, R. 490, 507)

O'Connor described her typical day as follows. She gets up and feeds her cats. It takes her awhile to wake up, so she sits in a chair and watches TV for an hour or so until she is fully awake. She then does some back and shoulder strengthening exercises, which are designed to strengthen her muscles to help alleviate her pain. She takes a shower and gets dressed. If she is scheduled for work, she will limit her activities to save her energy for work. If she is not working, then she will leave home around 2:00 p.m. to run errands, pay bills, or visit friends. (R. 510-12) She stated she frequently goes to Diana's or another friend's for supper because she does not cook much for herself, other than using the microwave, noting, "I'm just not too sure of myself cooking." (R. 512) After supper, she will relax and watch TV. About an hour before she goes to bed, she repeats her back and shoulder exercises. (*Id.*)

O'Connor does some of her own house cleaning, but she has friends who come on Wednesdays to help with the cleaning. She stated her friends help her pick things up off the floor, take out the garbage, and do dishes. (R. 517)

If her back and shoulder are hurting badly, O'Connor stated she uses an ice pack for fifteen minutes and then a heat pack for fifteen minutes. She will repeat the treatment after a couple of hours if she is still having a lot of pain. She stated she particularly needs the treatment on the nights she works, because the dishwashing increases her back and shoulder pain. (R. 512-13)

As far as leisure activities, O'Connor stated she used to enjoy fishing, but was having trouble with it due to her right arm pain. (R. 513) She stated she has several friends she visits in Pocahontas, and a few friends will stop by to visit her. (*Id.*)

B. Testimony of Diana Holtzkoff

Diana Holtzkoff ("Holtzkoff") stated she has been a friend of O'Connor's for about seven years, since they met at work. They live four blocks from each other, and see each other every day. (R. 518)

Holtzkoff first saw O'Connor having a seizure about a year prior to the hearing. (R. 524) She described O'Connor's seizures as follows:

> Usually she'll start yelling. Her eyes will glass over. She has no idea where she's at. Then she'll start shaking, screaming. At that time we'll usually try and get her and make sure she doesn't have anything in her mouth and take her glasses off and keep an eye on her.

(R. 519) Holtzkoff stated that although some of O'Connor's seizures are worse than others, she always starts shaking. To Holtzkoff's knowledge, O'Connor has no prior warning that a seizure is about to take place. (R. 519)

According to Holtzkoff, after O'Connor has a seizure she will be cold and shaky, and she will sleep. When she awakens, she will not know where she is or what happened, and Holtzkoff stated she makes O'Connor stay put for awhile "until she has her sense back." (R. 520)

Holtzkoff stated O'Connor has a small seizure, lasting anywhere from twenty to forty-five minutes, at least once a week, and sometimes as often as three times a week. She stated it takes O'Connor about half an hour to recover from a small seizure. (*Id.*) She stated O'Connor gets a "real bad one" about once every three months. (R. 524)

Holtzkoff testified she helps O'Connor with house cleaning, including vacuuming, taking her out of town to get groceries, and carrying the groceries in from the car. According to Holtzkoff, O'Connor has four or five friends who go over to her house a couple of times a week to help with house cleaning chores. (R. 521) Holtzkoff stated she

had been helping O'Connor with housework for about a year. (R. 525) Holtzkoff testified O'Connor would be unable to live alone without the assistance of her friends. (R. 521)

In response to the ALJ's questioning, Holtzkoff stated O'Connor used to drink (presumably alcoholic beverages), but she had not drunk in the year or two preceding the hearing. (R. 525)

3. O'Connor's medical history

The relevant period for purposes of O'Connor's current applications for benefits is on and after December 28, 1998. The record contains a large volume of medical records predating that time period. The court will refer to the earlier medical history only insofar as it relates to the question of whether O'Connor was disabled as of December 28, 1998.

a. Back and shoulder pain

O'Connor began experiencing problems with her shoulders as far back as 1984. (*See* R. 230) She complained of pain in both shoulders, and her arms and hands, intermittently over the years (*see, e.g.*, R. 213, 226, 229), but she did not begin seeking regular treatment for her shoulder problems until December 1994, when she was diagnosed with bursitis of her left shoulder. (R. 227, 283) Physical therapy, injections, and pain medication failed to resolve the problem, and it appears she underwent surgery on her left shoulder in February 1996 (*see* R. 282, 337, 356), although no medical records of the surgery itself appear in the record. O'Connor reportedly had "complete relief of all symptoms" following the surgery, and in April 1997, she requested a similar procedure on her right shoulder. (R. 356) She apparently underwent the procedure in late June 1997 (*see* R. 352), but again, no medical records from the surgery itself appear in the record.

On August 27, 1998, during a follow-up visit to the Neurology Department at Iowa City regarding her seizure disorder, O'Connor reported "low back pain, chronic, though worsening in the last few months that radiates to the right leg along its lateral aspect." (R. 345) She stated the pain began many years earlier, and she saw a chiropractor for awhile but stopped seeing him in January 1998, when she stopped getting any relief. She indicated the most intense pain was in her right sacral iliac joint region. She described the pain as constant, sometimes radiating down the lateral aspect of her thigh to her knee. Although the pain did not continue below the knee, her foot would go numb and she would have tingling paresthesias in all five toes. O'Connor also complained of right shoulder pain radiating into her arm. (*Id.*) The doctor noted the following from his examination findings:

> Her low back pain appears to be musculoskeletal in nature and there are no signs of a radiculopathy manifested by weakness, numbness or reflex changes. Also, her straight leg raise was basically negative for radiculopathy. She should continue taking the ibuprofen 800 mg [by mouth, three times daily] for the musculoskeletal low back pain. The back pain is probably exacerbated by work. She says that she has a 10-pound lifting restriction, although this is not realistic for her at work as a nurse's aide and she regularly helps out with lifting patients. This lifting of patients, which often places the lifter in a compromised mechanical position, is probably exacerbating her low back pain.

(R. 346)

On December 2, 1998, O'Connor saw her regular treating nurse practitioner Tonja S. Petersen-Anderson ("ARNP Anderson"), complaining that for about a month, she had been having severe pain in her right shoulder extending down into her arm. X-rays were taken and O'Connor was referred to Iowa City for examination by an orthopedic

specialist. (R. 386) Scott Stevens, M.D. examined O'Connor and felt her pain was due to problems with her cervical spine or paracervical musculature, rather than her shoulder. He fitted her with a cervical collar and referred her to "the spine team for full evaluation of her neck pain." (R. 339) In addition, Dr. Stevens sent O'Connor to physical therapy to learn some stretching and strengthening exercises she could do at home. He noted O'Connor was unable to take nonsteroidal anti-inflammatory medications due to gastritis, so she was told to continue taking Darvocet, which had been prescribed for her previously. (*Id.*)

On January 15, 1999, O'Connor was examined by a physical therapist and by Leon Grobler, M.D., to evaluate her ongoing neck and shoulder pain. X-rays of her cervical spine were "essentially negative," and she had normal cervical range of motion essentially without pain. Her shoulder range of motion also was normal, although she experienced "some discomfort throughout the range." (R. 359) The physical therapist opined O'Connor's pain likely was myofascial. He told her to use cold packs and showed her some new exercises. Dr. Grobler's examination revealed "hyperesthesia (variable) in [her] right upper arm," and he diagnosed a moderate cervical sprain and questionable RSD.[6] He recommended conservative treatment and follow-up as needed. (*Id.*)

O'Connor returned to see Ms. Anderson on January 22, 1999, and expressed frustration and disappointment with the Iowa City evaluations. She was anxious to return to full-time work because she was experiencing financial problems working only three hours per day. She stated her pain was no better and she felt overwhelmed. She reported numerous unsuccessful attempts to obtain disability benefits and other social services.

[6]The initials RSD, or RSDS, stand for Reflex Sympathetic Dystrophy Syndrome, which the Social Security Administration explains "is a chronic pain syndrome most often resulting from trauma to a single extremity. It can also result from diseases, surgery, or injury affecting other parts of the body . . . [or] [e]ven a minor injury. . . ." Policy Interpretation Ruling, 68 Fed. Reg. 59972 (Oct. 8, 2003).

Ms. Anderson urged O'Connor to reapply for disability benefits. She also suggested O'Connor "go to job service and try to find a position where she wouldn't have to lift." (R. 384) Ms. Anderson was not comfortable releasing O'Connor back to full-time work due to O'Connor's condition. Ms. Anderson indicated she would support O'Connor in any reapplication for disability benefits. (*Id.*)

O'Connor returned to see Ms. Anderson on February 15, 1999, complaining of tightness in her back with sharp, shooting pains down her legs. Ms. Anderson diagnosed her with a lumbar back strain and prescribed Celebrex and Darvocet. She indicated O'Connor was to stay on work restrictions, and she noted a functional capacity evaluation was scheduled at the Spine Clinic in Iowa City. (R. 383) At a follow-up appointment on February 23, 1999, O'Connor reported she could not take the Celebrex because it made her itch. She was still having back and leg pain. Ms. Anderson indicated she would set up a mental health evaluation for O'Connor, and she encouraged O'Connor "to start preparing [a] Social Security disability application again as that is what the social workers from Iowa City told us we need to get done on her. . . ." (R. 382)

O'Connor underwent a functional capacity evaluation at the Spine Diagnostic and Treatment Center, Department of Orthopaedic Surgery, University of Iowa Hospitals and Clinics, on March 25, 1999. (R. 361-77) During her assessment, she was noted to be "motivated, modestly self limiting and demonstrated some pain behavior." (R. 361) The evaluating team found she could squat lift up to five pounds occasionally and two-and-a-half pounds frequently; partial squat lift up to ten pounds occasionally and five pounds frequently; and arm lift up to ten pounds occasionally and five pounds frequently. (*Id.*) She could sit for up to twenty minutes with back support and up to ten minutes without back support. She had some difficulty climbing stairs. Her cardiovascular testing was normal to the extent she was able to complete the testing; however, she was unable to

perform the treadmill exam up to maximum workload, and doctors noted she had a "low fitness level, relative to [her] gender and age." (R. 361-62) They concluded that based on her endurance tolerance and pain symptomatology, she could consider performing sedentary to light work. (R. 362)

The Spine Treatment Team set forth the following treatment plan and recommendations for O'Connor:

> 1. To assist you in increasing your strength and flexibility, it will be very important for you to perform a daily exercise program as instructed by our therapists. You were instructed to walk briskly, at first 20-30 minutes a day. You should progress in your walking by 2-5 minutes per week until you are able to reach at least 30 minutes of exercise, 5-7 days per week.
>
> 2. It is felt that your overall health would be improved by discontinuing smoking and reducing your caffeine intake from 6-8 cans of pop a day to less than 2 cans of pop a day.
>
> 3. You were seen, at the urging of our clinical psychologist, by a physician in the Adult Outpatient Psychiatry Clinic on the day of your evaluation. Dr. Keffala also recommended that you continue to see your mental health counselor on a regular basis. You were also instructed in a basic relaxation and breathing technique for stress and pain management, and you were given a coping skills tape to practice with at home on a daily basis. We encourage you to use these stress management techniques on a regular basis.
>
> 4. You are encouraged to proceed with your Social Security Disability application. As part of this application you should include reports from all of the professionals who have worked with you in the past including the Department of Vocational Rehabilitation Services and reports from the community college where you were enrolled in a training program. Specifically, you should include reports about your learning

> disabilities and Attention Deficit Hyperactivity Disorder, as well as mental health information.

(R. 362)

On July 20, 1999, Ms. Anderson wrote a letter on O'Connor's behalf to Disability Determination Services ("DDS"), in which she opined that with the restrictions found by the evaluation team at the Spine Center, O'Connor would be unable to continue working as a nursing assistant. She noted O'Connor would be limited in her other employment options because she is "unskilled and untrained and does not qualify for many positions in town," noting those positions for which she qualified involved manual labor that O'Connor was unable to perform. (R. 381)

Gary J. Cromer, M.D. conducted a paper review of O'Connor's medical records and completed a Physical Residual Functional Capacity Assessment on August 16, 1999. From his review, Dr. Cromer concluded O'Connor could lift fifty pounds occasionally and twenty-five pounds frequently; stand or walk and sit for up to six hours in an eight-hour workday, and push/pull without limitation. He found her to have no postural, manipulative, visual, or communicative limitations, and her only environmental limitation was that she should avoid exposure to hazards such as machinery and heights. Dr. Cromer noted some of O'Connor's treating or examining source conclusions were significantly different from his findings, but he found other opinions were not supported by the objective medical evidence. He found her subjective complaints "reveal[ed] numerous inconsistencies," as follows:

> She has failed to substantiate her allegation of "mini-strokes". Workup of her chronic neck and back complaints has revealed only minimal findings. At FCE she demonstrated significant pain behavior and self-limitation. She stopped the prescription analgesic Celebrex 2/99, and was only taking Tylenol for joint

> pain at last report. These inconsistencies have eroded [her] credibility.

(R. 401)

The court finds Dr. Cromer's statement that O'Connor "demonstrated significant pain behavior and self-limitation" to be in error. The FCE report indicates that during O'Connor's evaluation, she was "motivated, modestly self limiting and demonstrated some pain behavior." (R. 361) Further, it was noted that although she exhibited "[m]oderate nonverbal pain behavior," O'Connor put forth an "[a]dequate effort." (R. 369)

O'Connor continued to have shoulder, back and leg pain, and some leg numbness, on an ongoing basis for the next two years, until the conclusion of the record evidence in June 2001. She saw Ms. Anderson on October 5, 7, and 12, and received continued medication therapy and work releases. (R. 418-19, 465)

On November 18, 1999, she began treatment by Richard W. Rosenquist, M.D. in the University of Iowa's Pain Medicine Clinic. Dr. Rosenquist ordered an MRI of O'Connor's back, which revealed a moderate disc bulge at L4-5, and a small disc bulge at L5-S1, with no canal stenosis or foraminal narrowing. (R. 421-22)

O'Connor returned to see Ms. Anderson on December 10, 1999, complaining of pain in her back, radiating down her right leg and somewhat down her left leg. Ms. Anderson prescribed Darvocet and Robaxin, noting O'Connor was unable to take nonsteroidal anti-inflammatory medications due to a gastrointestinal bleed. Ms. Anderson noted she would "get ahold of the Pain Clinic and see what they want to do with [O'Connor] from now on out especially with a herniated disk and her constant pain." (R. 428)

Dr. Rosenquist of the Pain Clinic performed trigger point injections on O'Connor's back on January 31, 2000, and prescribed continued use of a TENS unit. (R. 432-33, 479-

81) O'Connor responded well to the injections. On April 27, 2000, she reported sleeping better, working most of the day without difficulty, and significant improvement. She stated she had pain in her low back when she bent over, but although the pain radiated into her right hip, it did not radiate into her leg or foot, and the pain improved with standing up. She reported taking Darvocet once per week. (R. 477-78)

Although O'Connor's back pain was improved at the April visit, she reported increasing pain in her right shoulder, and stated the shoulder sometimes locked up. The doctor prescribed physical therapy for O'Connor's shoulder. (*Id.*)

O'Connor returned to see Ms. Anderson on May 18, 2000, to talk about her ongoing problems. She reported she had been "turned down for disability again." (R. 464) Ms. Anderson noted O'Connor "does have herniated discs in her back and she is working through the Pain Clinic, she tries to wear a TENS unit but it does nothing but irritate her skin." (*Id.*) Ms. Anderson suggested O'Connor consider a different job, such as a food service place, but O'Connor stated that type of job would require her to count back change, which she is unable to do. Ms. Anderson offered to explore vocational rehabilitation options for O'Connor. (*Id.*)

On May 23, 2000, O'Connor saw Dr. R. Kumar Kadiyala at the University of Iowa, who diagnosed her with a recurrent subacromial impingement in her right shoulder. X-rays of her shoulder were essentially normal with no evidence of degenerative changes in the joint. Robert Greenberg, M.D. gave O'Connor a subacromial injection with Lidocaine and Celestone, which gave her "near complete relief of her shoulder pain." (R. 475) She continued to exhibit slight weakness, but she was able to move without pain. The doctors recommended she continue doing therapy exercises to strengthen her rotator cuff. (R. 275-76)

O'Connor returned to see Ms. Anderson on May 30, 2000, to discuss her Iowa City treatment. Ms. Anderson noted the following: "She did find out that she had a piece of her clavicle broken off. It slid under the rest of her clavicle and she is to have it removed at some point in time. She can't afford to have it removed because she can't afford to be off work, so she did get a cortisone injection." (R. 463) The court has not located further evidence of a broken-off clavicle.

Ms. Anderson also noted O'Connor was "doing pretty good with her disc disease" (*id.*), although O'Connor reported excruciating back pain whenever she bent over at the waist as opposed to bending her knees. Ms. Anderson again stated she would discuss O'Connor's situation with Vocational Rehabilitation Services to see if there was any other type of employment that would be suitable for her. (*Id.*)

O'Connor returned to see Ms. Anderson on July 31, 2000, requesting a note for work restriction. She stated her employer had lost her old notes and had been making O'Connor do nurse's aide type work. She complained of tenderness in her back, and numbness and tingling down her legs. Ms. Anderson wrote a work restriction for maximum lifting of ten pounds. (R. 463)

O'Connor returned to the Pain Clinic for follow-up on August 23, 2000. Notes indicate she was "in no acute distress." (R. 473) O'Connor reported increased back and leg pain. She stated she continued to do stretching exercises, and she admitted to smoking one pack of cigarettes daily. On examination, she evidenced tenderness to palpation on the right side of the L4-5, and mildly limited range of motion in her right shoulder with very mild pain. Dr. Jeffrey Merryman diagnosed O'Connor with "low back pain with radicular extension of primarily 2 components: one is probably continued disc herniation and giving her radicular spread[,] and second [is] myofascial low back pain." (R. 474) O'Connor received another epidural steroid injection and was told to continue using the

TENS unit, continue exercising, work on quitting smoking, and return for follow-up in six months. The doctor also prescribed a trial of Vioxx. (R. 473-74)

O'Connor returned to the Pain Clinic for follow-up on February 22, 2001. She reported that she had stopped using the TENS unit because she developed a sensitivity to the adhesive in the patches. She complained of right-sided buttock pain radiating down her right leg, and right-sided shoulder pain. She reported sleeping well, and she still was smoking about a pack a day. The doctor noted O'Connor had "been encouraged to stop smoking on multiple occasions, but does not wish to do so at this time." (R. 470) O'Connor was treated with trigger point injections of the piriformis and deltoid muscles on the right. Her Vioxx dosage was increased, and she was "encouraged to resume using of the TENS unit using different brand of gel pad." (R. 470) She was told to return for follow-up in six to eight weeks. (R. 470-71)

O'Connor was next seen in the Pain Clinic on April 29, 2001. She reported continued pain in her low back and right-sided radicular pain, but she stated her right shoulder pain was better after the trigger point injections. She also reported increased lower back and lower extremity pain, and stated she was having trouble working. She also was having some sleep disturbance. The doctor diagnosed her with right lower extremity radiculopathy with mechanical low back pain. She was continued on Vioxx and started on Neurontin. The doctor recommended physical therapy to recondition her lumbar spine, and a psychological evaluation for stress coping mechanisms. (R. 468-69)

b. Seizures

It appears O'Connor may have begun having seizures as early as 1986, although she was not diagnosed with seizures at that time. (*See* R. 228) In 1992, Selden E. Spencer, M.D. noted O'Connor was being treated with Depakote for probable partial complex

seizures. His impression was that O'Connor was, indeed, having seizures, although he could not fully rule out that she actually was having complex migraines. He continued her on Depakote. (R. 211)

O'Connor was evaluated for a seizure disorder on February 25, 1997, by a Dr. Rosenblatt. He noted O'Connor had sores on her tongue and mouth that appeared to resemble bite marks. O'Connor reported a history of seizure disorder since age sixteen. She reported taking Depakote until 1993, but stated she had discontinued the medication at that time because her seizures were well controlled and she could not afford the medication. She stated she had gotten along fairly well until around January 1997, when she had begun having seizures more frequently. From her description, the doctor noted the seizures likely were grand mal seizures. (R. 282) The doctor noted, "In [O'Connor's] mouth there are injuries consistent with bite marks most likely [illegible] inflicted during a seizure." (*Id.*) He also observed contusions that could have been sustained during seizure activity. The doctor made O'Connor an appointment with a neurologist, restarted her on Depakote, and contacted Social Services to inquire about funding for her medications and transportation to her appointment in Iowa City. (R. 282) Dr. Rosenblatt refilled O'Connor's Depakote prescription on March 3, 1997, noting the report was not back yet from Iowa City. (*Id.*)

O'Connor was seen in Iowa City on March 21, 1997, for evaluation of her seizure disorder. (R. 357-58) She described her seizure episodes over the preceding two months. Her neurological examination was normal "except for color desaturation present only in the temporal field of right eye." The doctor was unable to reproduce a seizure with three minutes of hyperventilation. He concluded her history was compatible with "complex partial seizures with possible secondary generalization." (R. 358) He ordered an EEG,

a brain MRI, and laboratory testing. He continued her on Depakote, and also advised her that she must be spell-free for six months before she could begin driving again. (*Id.*)

O'Connor was seen again on July 14, 1997, and she reported a prolonged, single seizure episode on May 11, 1997, while she was at work. She described it as an "episode of staring lasting up to 2 hours." Although she had no recollection of events during that time, she stated her coworkers told her she had run into objects and stared off into space. The doctor noted O'Connor's recent MRI of the brain and brainstem was normal, but her EEG "revealed 3 transient sharp waves in the right temporal region" (R. 351), suggesting "seizure tendency of focal origin." (R. 378) The doctor ordered a sleep-deprived EEG. He again emphasized that O'Connor should not drive until she had been seizure-free for six months. He continued her current dosage of Depakote. (R. 354-55) O'Connor's EEG was normal, both awake and asleep. (R. 353)

O'Connor was seen for follow-up on April 22, 1998, and reported three spells since her last visit, all of which occurred during sleep. (R. 351) A repeat EEG remained normal, both awake and asleep. (R. 350) Doctors noted O'Connor had "considerable emotional stress from her job." (R. 351) They found her recent spells were "of an unclear nature" and did not appear to be epileptiform. Her current Depakote level was continued, and it was noted that if her spells continued, a sleep study might be warranted. (*Id.*)

O'Connor returned to the Neurology Department on August 27, 1998, for follow-up. She reported no seizures since her last visit in April. Her neurological examination demonstrated normal mental status. The doctor refilled her Depakote prescription. (R. 345-46)

O'Connor was seen in the Neurology Department for follow-up on June 5, 1999. (R. 378-79) Doctors noted her affect was flat and she looked depressed. She reported

having "about five seizures" since July 1998, with the most recent being about three weeks prior to this visit. Notes indicate her Depakote dosage had been increased in January 1999, to 375 mg. three times daily. On examination, she had intact remote and recent memory. Her cranial nerve exam, motor exam, and coordination tests were normal. Notes indicate her "[d]eep tendon reflexes were symmetrical, but were brisk in the upper and lower extremities," and "plantar reflexes were downgoing bilaterally." (R. 378) "Sensory exam showed inconsistent findings of decreased light touch and pinprick in the upper and lower extremities on the right side." (R. 378-79) Doctors told O'Connor she needed to stop driving, and she reported that she had done so. They increased her Depakote to 500 mg. three times daily, instructed her to cut down on her caffeine intake, and recommended she try to discontinue taking Darvocet. (R. 379)

O'Connor returned for follow-up on January 31, 2000. (R. 430-33) Her neurological symptoms were unremarkable since her last evaluation. She reported only one probable seizure in about September 1999, that involved "some headache upon awakening from sleeping" and "urine incontinence." (R. 430) O'Connor felt her seizures were "under good control," and the doctors agreed. They recommended she maintain the same Depakote level, and return for follow-up in six months. (*Id.*)

Ms. Anderson completed a residual functional capacity questionnaire regarding Anderson in June 2001. (R. 482-90) Regarding Anderson's seizures, Ms. Anderson listed her diagnosis as "complex partial seizures with secondary generalization," typically lasting fifteen to twenty seconds (as of 1997), and involving no loss of consciousness. Ms. Anderson indicated she did not know the frequency of O'Connor's seizures, but she was not aware of any recent seizure activity. (R. 482) She noted O'Connor does not always have a warning prior to a seizure, and the seizures do not occur at any particular time of day. (R. 483) She indicated that after a seizure, O'Connor's most common

manifestation is a severe headache of unknown duration. (*Id.*) She opined O'Connor's seizures likely would disrupt the work of co-workers. (R. 484)

According to Ms. Anderson, O'Connor is not a malingerer, and her physical and emotional impairments are reasonably consistent with her symptoms and functional limitations. Regarding O'Connor's low back pain, Ms. Anderson opined the pain is often severe enough to interfere with O'Connor's attention and concentration. She estimated O'Connor's functional limitations in a competitive work environment would be the following: sitting fifteen to twenty minutes at a time with support; standing forty-five minutes at a time before needing to change position or walk around; sit and stand/walk "total in an 8 hour working day (with normal breaks)" for less than two hours; must walk around for five minutes every half hour; must be able to change positions at will from sitting, standing, or walking; and sometimes will need to take unscheduled breaks for five minutes, depending on her pain level. (R. 486-87) She opined O'Connor could lift ten pounds rarely, and only rarely should she twist, stoop/bend/crouch, or climb ladders. She could climb stairs occasionally. Ms. Anderson indicated O'Connor has significant limitations in her ability to perform repetitive reaching, noting she should not lift more than ten pounds overhead. (R. 488) Ms. Anderson estimated O'Connor would be absent from work about four days per month as a result of her impairments. (R. 489)

Ms. Anderson indicated O'Connor is "mildly mentally retarded," and she would need more supervision at work than an unimpaired worker. She opined O'Connor would need to take unscheduled breaks two to three times per day for fifteen minutes at a time. (R. 489) This opinion differs from her opinion earlier in the questionnaire indicating O'Connor would need to take unscheduled breaks occasionally for five minutes at a time. Though not clear, it appears from the location of the questions in the form that the second

question addressed unscheduled breaks specifically due to mental problems. (*Compare* R. 478, question 32(g) *with* R. 489, question 40)

Despite the limitations she noted in the questionnaire, Ms. Anderson opined O'Connor would be able to tolerate a low-stress job. (R. 489-90)

c. Depression and other mental problems

O'Connor was diagnosed with borderline intellectual functioning in June 1988, by doctors at the Spencer Municipal Hospital. (*See* R. 194-210) She was diagnosed with depression as early as February 1993 (*see* R. 212, 228), but did not begin seeking treatment regularly until March 1996. At that time, O'Connor referred herself for evaluation at Seasons Mental Health Center due to depressive symptoms and suicidal ideation without a plan. She stated she was an alcoholic, and reported being through two inpatient and two outpatient treatment programs. The evaluator noted much of O'Connor's depression seemed to be related to problems at work, and she opined the depression would decrease once O'Connor received a doctor's release to return to work. (R. 336-38)

O'Connor continued to receive regular counseling and treatment for depression from March 1996 through December 1997. (*See* R. 244-46, 285-91, 300-35) Records indicate she was extremely low-functioning and drinking regularly in May 1996 (*see* 244-46), but over the succeeding months, she continued to seek treatment and evidenced a desire to get better. Her level of functioning appears to have improved when she was not drinking and was working regularly. Her depressive symptoms and the presence or absence of suicidal ideation and plans fluctuated during this period depending on her financial circumstances, work situation, and personal relationships. (*See* R. 244-46, 285-91, 300-35)

The record contains little evidence of O'Connor's mental health treatment after December 1997. (*See* R. 298; 416) A note by Ms. Anderson on February 3, 1999,

indicates she had received past records from Cherokee Mental Health that listed O'Connor as having "several different types of personality disorder, mild mental retardation, [and] seizure disorder." (R. 383) Ms. Anderson indicated O'Connor should be reevaluated by a psychiatrist for purposes of seeking "some disability for her mild mental retardation, etc." (*Id.*)

O'Connor underwent a psychological evaluation by clinical psychologist Valerie J. Keffala, Ph.D. at Iowa City on March 24, 1999. (R. 371-73) Dr. Keffala found O'Connor to be "a timid and somewhat shy woman" with depressive symptomatology. O'Connor reported seeing her therapist once or twice each week. (R. 373) Dr. Keffala recommended O'Connor be evaluated in the Adult Outpatient Psychiatry Clinic, and O'Connor agreed (R. 372); however, notes from that evaluation are not in the record. It appears the evaluation led to Zoloft being prescribed for O'Connor because on May 27, 1999, Ms. Anderson noted O'Connor had been placed on Zoloft by doctors at Iowa City., and O'Connor reported she was "doing nicely" on the Zoloft. (R. 382)

On June 23, 1999, at the time O'Connor filed her applications for benefits in this case, she had a face-to-face meeting with a representative of the Social Security Administration. The representative noted O'Connor had difficulty understanding, talking, answering, sitting, standing, and walking, which the representative elaborated upon as follows: "The claimant had trouble remembering information, talked slowly, didn't come across as very educated, had to stand and stretch during the interview, had trouble getting out of the chair and walked very cautiously." (R. 105)

On August 27, 1999, Carole Kazmierski, Ph.D. completed a Psychiatric Review Technique ("PRT") (R. 402-10) and Mental Residual Functional Capacity Assessment ("MRFC") (R. 411-15). She noted O'Connor's depression had been controlled on Zoloft since May 27, 1999. (R. 403) She opined O'Connor was slightly limited in terms of

restriction of the activities of daily living, and moderately limited in terms of difficulties maintaining social functioning. (R. 409)

Dr. Kazmierski's opinions are somewhat contradictory. In the PRT, she opined O'Connor "often" would have deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. (R. 409) However, in the more detailed MRFC, she found O'Connor to be only moderately limited in her ability to carry out detailed instructions, maintain attention and concentration for extended periods, complete a normal workday and workweek without interruption from psychologically based symptoms, and perform at a consistent pace without an unreasonable number and length of rest periods. (R. 411-12)

Dr. Kazmierski also found O'Connor to be moderately limited in her ability to understand and remember detailed instructions; to accept instructions and respond appropriately to criticism from her supervisors, who had characterized O'Connor as occasionally moody; and to get along with coworkers or peers without distracting them or exhibiting behavioral extremes. (*Id.*)

On February 29, 2000, O'Connor underwent a psychiatric evaluation by John Mathews, M.D., a psychiatrist at Seasons Mental Health Center, as part of O'Connor's application for disability benefits. (R. 434-38) In summarizing O'Connor's mental health history, Dr. Mathews noted O'Connor had stopped taking the Zoloft after her one-month supply of samples ran out, and she had not followed up with any doctor after that time. (R. 435) He noted O'Connor had "a tested IQ of 81, with verbal IQ of 80 [and] performance IQ of 84." (R. 437) He reviewed O'Connor's medical history, and performed a mental status examination in which he noted the following:

> Teresa O'Connor appears stated age. She has fair grooming and hygiene. She has good eye-to-eye contact, decreased

> psychomotor activity. Patient was calm and cooperative throughout the interview. Speech is somewhat aprosodic in nature [*i.e.*, monotonal, with decreased intonation patterns]. She has normal latency of response and normal spontaneity of speech. Flow of thought is logical, sequential, and goal oriented. Content of thought reveals some feelings of helplessness, hopelessness, worthlessness, passive death wishes, suicide ideation without plan or intent, no homicide ideation, mood is described as "okay". Affect is, however, somewhat tearful, depressed, decreased in range. Sensorium and intellect: patient is awake, alert, oriented x 3. She has limited abstraction abilities, she appears to have good memory for recent and remote events. Appears to have good attention and concentration.

(*Id.*)

Dr. Mathews diagnosed O'Connor with "Major Depressive Disorder, recurrent, severe in nature, without psychosis"; "Alcohol Dependence, in partial remission"; "Mathematics Disorder"; and "Borderline Intellectual Functioning." (*Id.*) In the Assessment portion of his report, the doctor described O'Connor is having "borderline intellectual functioning, poor coping skills, poor social skills, as well as deficiencies in social support systems," and he noted she "presents with chronic depressive syndrome which has never been adequately treated." (R. 438) He found no evidence to support past diagnoses of PTSD or multiple personality disorder. He noted her depressive syndrome was complicated by alcohol dependence, but also noted the alcohol problem had been controlled better over the preceding three years, concluding "I feel this is not an ongoing problem." (*Id.*)

Dr. Mathews described O'Connor's daily activities and overall functioning as follows:

> Patient currently spends most of her time working. When she's at home, she tends to spend most of the time by herself, or with her father. At times, she enjoys watching TV, spends time taking care of her kitten, or doing household chores, or buying groceries for herself. She does have adequate attention and concentration, although her intellectual functioning is somewhat borderline. She can understand simple instructions and procedures. She does have markedly poor social skills, seems to have a somewhat impulsive response to any social stress, and this has probably caused a lot of problems with her supervisors and co-workers. She also does exhibit poor judgement in social situations, as well as regarding her treatment. She has poor insight into her mental illness also.
>
> Given the history of borderline intellectual functioning, her learning disability, and seizure disorder, it [is] highly likely that some of her psychiatric symptoms, including the major depression, might be related to an organic etiology. The treatment for the depression, however, would still remain the same, which includes basically treating her with anti-depressants.

(*Id.*) O'Connor indicated a willingness to resume taking Zoloft but was concerned about the cost, and about the cost of any continued counseling. Dr. Mathews provided her with some Zoloft samples, and gave her information about available programs to assist her with the costs of treatment. (*Id.*)

On April 10, 2000, David G. Beeman, Ph.D. completed a PRT form (R. 441-49) and Mental RFC evaluation (R. 450-54). He found O'Connor would have slight limitation in terms of restriction of the activities of daily living, and moderate limitation in terms of difficulties maintaining social functioning and deficiencies of concentration, persistence or pace. (R. 448) He found her to be moderately limited in her ability to understand, remember, and carry out detailed instructions; complete a normal workday and workweek without interruptions from psychologically based symptoms; perform at a consistent pace

without an unreasonable number and length of rest periods; accept instructions and respond appropriately to criticism from supervisors; get along with coworkers or peers without distracting them or exhibiting behavioral extremes; and respond appropriately to changes in the work setting. (R. 450-51)

Dr. Beeman found O'Connor to have severe impairments consisting of "fairly chronic" depression, borderline intelligence, and a history of alcohol dependence in partial remission. However, he found her mental impairments "did not meet any mental listings[.]" (R. 440) Dr. Beeman found O'Connor's credibility to be eroded by her inaccurate reporting of her mental health treatment. He noted O'Connor told an examiner "on 1-19-00" that she was involved in ongoing therapy at Seasons Mental Health Center, seeing a therapist "every couple of weeks and last saw therapist the day before," when records from Seasons indicated they last saw O'Connor in December 1997. (R. 440) The court has found no records relating to an examination of O'Connor "on 1-19-00"; however, in her evaluation by Dr. Keffala on March 24, 1999, she did report seeing her counselor "1-2 times per week" at that time. (R. 373) The court notes Dr. Beeman offered an explanation for the discrepancy in his review comments, indicating, "Initially the inability to locate information from the therapist was viewed as eroding credibility, but it now appears more likely that the therapist works in 2 locations"; *i.e.*, the Seasons Center in Spencer, Iowa, and also in Pocahontas, Iowa. (R. 454) O'Connor testified the Seasons Center formerly had a satellite office in Pocahontas. (R. 510) In any event, as noted previously, there is nothing in the record to evidence O'Connor's treatment for mental health problems after December 1997, except the prescription for Zoloft. Dr. Beeman indicated he was giving O'Connor the benefit of the doubt regarding the inconsistency regarding her current counseling. (R. 455)

Dr. Beeman noted O'Connor's supervisor at work indicated she "works slowly but consistently," "understands her duties and completes them without special supervision," and "follows the rules and schedules." (R. 454) However, according to Dr. Beeman, the supervisor described O'Connor as "occasionally moody and unstable," and opined she would be "unable to cope with the stress and responsibility of full-time work." (*Id.*) Nevertheless, despite her slight to moderate psychological limitations as noted in his assessments, Dr. Beeman concluded that from a psychological perspective, O'Connor "retains the ability to complete simple, routine, and repetitive work functions when not unduly stressed." (R. 455)

4. Vocational expert's testimony

The ALJ asked VE Elizabeth Albrecht the following hypothetical question, considering O'Connor's past relevant work as listed by the VE (*see* R. 193):

> [C]onsider that for the basis of the first hypothetical question, that lifting was limited to 30 pounds maximum. Now the Claimant could sit for up to 45 minutes at a time and walking was possible for up to six minutes at a time. That any bending would have to be infrequent. That the reports of her employers and the psychological testing show that she would need some supervision when first presented with a task but would learn quickly. Interaction with others should be short and superficial. She could not do any fast paced work. She would be better where a consistent work effort is more important then [sic] the pace of the work. There should be no stressful interaction or work situations. She should not have to communicate extensive information to others. She should not have to work around heights, ladders, and moving machinery. That testing has shown she's able to do sorting samples at an average ability with average eye/hand coordination. Calculations are done out to a fifth grade level.

> Word recognition at a ninth grade level. And 14th grade comprehension. With those limitations and abilities, would she be able to return to any of the work she has done. . . .

(R. 528-29) The VE responded that the hypothetical individual would be unable to do any of O'Connor's past work. (R. 529) In addition, other than the job as a personal attendant, none of O'Connor's other past work would have given her skills that could be transferred to other work. (R. 530) Further, if the hypothetical individual had seizures that would keep her out of work three or more times per month, she would be unable to engage in any type of competitive employment. (R. 533)

In a second hypothetical scenario, the ALJ asked the VE to consider that the hypothetical individual is a younger individual with a high school education and CNA certification, with the same mental limitations as the individual in the first hypothetical (*see* R. 534-35), and who could stand without limitation, sit up to forty-five minutes at a time before changing position, and walk at least six minutes at a time based on stress testing. The VE replied that if the individual could stand for up to two hours, she physically would be able to do light, unskilled work such as assembler of small products, mail order clerk, and laundry folder. The VE noted that if the individual's mental limitations were taken into account, that would preclude the mail order clerk job, but it would not affect the individual's ability to do the other two jobs. (R. 530-31, 535) However, as noted previously, the VE opined that if the hypothetical individual had seizures that would keep her out of work three or more times per month, she would be unable to engage in competitive employment. (R. 533)

The ALJ next asked the VE to limit dynamic lifting to five to ten pounds, with repetitive lifting in the two- to five-pound range, and no climbing of steps and stairs. The

VE stated those limitations would put the hypothetical claimant in the sedentary category, which would include jobs such as addresser, vinyl assembler, and order clerk. (R. 531-32)

The ALJ then asked the VE the following hypothetical question:

> I['d] like to ask you what affect [sic] it would have on her ability to perform such work activity as sedentary or light work if on occasion she's unable to walk up to one block, can only sit for 15 to 20 minutes at a time with support, and stand for 45 minutes at a time, for a total for the day of two hours sitting and standing. After every 30 minutes of – oh, okay. That she must walk every 30 minutes for a period of five minutes. That she must be able to shift at will from sitting and standing or walking. That she may take unscheduled breaks of five minutes during the day. Can rarely lift ten pounds. Can rarely twist, stoop, crouch, climb ladders, and only occasionally climb stairs. Has a significant limitation in doing repetitive reaching, handling, and fingering. Would require more supervision tha[n] an unimpaired worker. Cannot work at heights. Cannot work with power machines that require an alert operator. Cannot operate a motor vehicle. Would take unscheduled breaks during an eight hour day of two to three times per day for up to 25 minutes With those limitations, would she be able to do the lighter sedentary work as you've described?

(R. 532) The VE responded that this hypothetical individual would be unable to work. (*Id.*)

5. The ALJ's decision

The ALJ noted O'Connor worked for Pocahontas Manor through August 2000, and although her work had been subsidized to an extent, her earnings level was in excess of the substantial gainful activity ("SGA) level through August 2000. (R. 19) The ALJ then noted O'Connor began working part-time as a dishwasher in October 2000, but he found

her earnings from that job did not meet the SGA threshold. (R. 20) The ALJ concluded that O'Connor had not engaged in substantial gainful activity since October 2000. (R. 27, ¶ 2)

The ALJ found O'Connor's seizures to be "controlled and infrequent" and not to limit her ability to do work-related activities. He therefore concluded her "seizure disorder is a non-severe impairment." (R. 20) In reaching this opinion, the ALJ took note of only one medical examination relating to O'Connor's seizures, to-wit: her January 31, 2000, examination at the University of Iowa's Neurology Clinic. (*Id.*) Although he noted O'Connor "has been treated for seizures for several years," he did not discuss any of her prior treatment for seizures. (*Id.*)

The ALJ found O'Connor to have severe impairments consisting of "right shoulder pain, lumbar pain with some lower extremity pain, personality disorder, depression, and a history of alcohol abuse." (R. 23; *see* R. 20-23) He concluded none of these impairments was severe enough to meet the listing requirements. (R. 23)

The ALJ determined that O'Connor's allegations regarding her limitations were not credible based on "the lack of objective medical findings to support her alleged limitations, and her reported inconsistencies." (R. 25) In support of this finding, he cited the following:

> When Andrea J. DeLeo, D.O., M.S., Fellow, advised the claimant of the need to stop driving because of her seizures, the claimant replied that she does not drive a car anymore. However, the claimant testified that she limits herself to only driving in her hometown although the risks of driving locally with seizures are as great as anywhere else. She stated she was afraid of driving in Fort Dodge. The claimant reported she became unable to work in December 1998. However, she continued to work, which leads one to believe that she is not as limited as alleged. The claimant requested a work release

> to return to full duty at work. She said she could not afford to work 3 hours a day. She reported that she could not afford to pay her car payment, yet she is able to purchase cigarettes, has cable television at home, and frequently takes her cats to the veterinarian. The claimant said that she has pain 24 hours, of each day. However, the medical evidence regarding the claimant's chronic neck and back complaints has revealed only minimal findings. The medical evidence does not support the claimant's allegations regarding the severity of her impairments. The claimant was able to exercise on a stress test for 6 minutes, and performance was described as 'moderately self-limited.['] On January 22, 1999[,] she wanted release to full-time work rather than 3 hours. There is some question as to alcohol use[.] She had been told to try lighter work in May 2000[,] but said she could not because she could not make change[.] As of January 2000[,] she was able to do her job and exercise, taking only 2 Darvocet when the pain was severe. After having done well there was an increase of pain in August 2000[,] but she improved with a shoulder injection despite a recent increase of work duties. In addition, the claimant has given inconsistent statements to her doctors and the administration.

(R. 24-25; exhibit citations omitted)

The ALJ discounted the testimony of O'Connor's friend Diana Holtzkoff because her "perception of the claimant's impairments is not consistent with what the claimant has reported." (R. 25) Specifically, he noted Holtzkoff testified O'Connor has seizures "about three times a week" and O'Connor "has no warning before she has a seizure." (*Id.*) However, O'Connor had "reported her seizures occur less frequently, and that she is warned before her seizures occur." (*Id.*) Therefore, the ALJ concluded he was not persuaded by Holtzkoff's testimony regarding O'Connor's seizures. (*Id.*)

The ALJ then addressed whether O'Connor retained the residual functional capacity ("RFC") to perform any of her past relevant work. He concluded O'Connor had the following RFC:

> [T]he claimant has the residual functional capacity to lift up to 30 pounds[.] The claimant can walk for 6 minutes, at a time, and sit for 45 minutes at a time[.] She can do infrequent bending[.] The claimant can not [sic] climb ladders, and she should avoid heights, and moving machinery[.] The claimant can do eye to hand coordination and sorting at an average rate[.] Calculation ability is at the 5th grade level, word recognition is at the 9th grade level and reading comprehension at the 14th grade level[.] The claimant requires some supervision when tasks are first presented to her but can learn quickly, and is able to understand, carry out, and remember simple instructions. She can not [sic] perform fast-paced work and works best when where [sic] consistent effort is more important than pace[.] The claimant is limited to short, simple interaction with supervisors, co-workers, and the public but needs to avoid stressful interaction or situations[.] She has some difficulty in communicating with others so she [should] not have any need to communicate extensive information to others as part of a job[.]

(R. 25; all exhibit citations omitted)

Based on this RFC and the VE's testimony, the ALJ concluded O'Connor cannot do any of her past relevant work. (R. 25-26) However, he found O'Connor retains the RFC to perform a significant range of light work that exists in the national economy, citing the VE's examples of an assembler, mail clerk, laundry folder, addresser, and final assembler. The ALJ ruled out the job of order clerk which could involve calculation abilities beyond the fifth grade level. (R. 26) The ALJ therefore concluded O'Connor was not disabled at any time through the date of his decision. (R. 26; 28 ¶ 14)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see "whether the claimant has a severe impairment that significantly limits the claimant's physical or mental ability to perform basic work activities." *Dixon*, 353 F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

> The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." . . . Such abilities and aptitudes include "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; "[c]apacities for seeing, hearing, and speaking"; "[u]nderstanding, carrying out and remembering simple instructions"; "[u]se of judgment"; "[r]esponding appropriately to supervision, co-workers, and usual work situations"; and "[d]ealing with changes in a routine work setting."

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's residual functional capacity ("RFC") to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 ("RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, 'what the claimant can still do' despite his or her physical or mental limitations.") (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon*, *supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical

history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner "to prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined at step four], age, education, and work experience." Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003); *Banks v. Massanari*, 258 F.3d 820, 823 (8th Cir. 2001) (citing *Lowe v. Apfel*, 226 F.3d 969, 971 (8th Cir. 2000)); *Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) (citing 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This review is deferential; the court must affirm the ALJ's factual findings if they are supported by substantial evidence on the record as a whole. *Id.* (citing *Estes v. Barnhart*, 275 F.3d 722, 724 (8th Cir. 2002); *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir.

1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial." *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline*, *supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not "reweigh the evidence presented to the ALJ," *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or "review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *accord Baldwin*, 349 F.3d at 555; *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier,* 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d

1193, 1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; *see Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.,* 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen,* 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.,* 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.,* 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala,* 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan,* 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

O'Connor first argues the ALJ based his RFC assessment on a state agency consultant's opinion that was rendered in July 1996, and other testing and evaluations from November 1997, all of which were too far removed from the time period at issue in this case to be relevant. (*See* Doc. No. 8, pp. 10-12) She further argues the ALJ failed to evaluate all of the evidence, specifically the residual functional capacity questionnaire completed by Ms. Anderson on June 12, 2001, and the functional capacity evaluation performed by the University of Iowa's Orthopedic Surgery Department on March 25, 1999. (*See id.*, p. 13, citing R. 361-63, 482-90)

As to the latter evaluation, the court notes the ALJ summarized a portion of the evaluator's findings, and took note of the functional limitations expressed in the report. He noted the evaluator found O'Connor's "maximum non-repetitive lifting was limited to squat lifts, up to 5 pounds; partial squat lifts; and arm lifts, up to 10 pounds"; her "maximum repetitive lifting limits are squat lifts 2.5 pounds; partial squat lifts; and arm lifts, 5 pounds"; and she "could tolerate sitting, with back support, 15-20 minutes, and 5 to 10 minutes, without back support." (R. 21) However, the ALJ discounted these findings because, in the ALJ's view, they represented the opinion of a physical therapist, and because the ALJ found the findings to be inconsistent with the record as a whole. (*See* R. 24) The ALJ failed to take note of the fact that the evaluation report was signed not by the physical therapists who performed some of the testing, but by orthopedic surgeon Leon J. Grobler, M.D., and by vocational consultant Donna Chandler. The court finds the ALJ failed properly to reconcile the functional limitations found by the staff at the Spine Diagnostic and Treatment Center at the University of Iowa with his own, differing, opinion as to O'Connor's RFC.

Furthermore, as noted by O'Connor, the ALJ failed to discuss at all the RFC opinions of Ms. Anderson, who has been treating O'Connor regularly for a number of years. The ALJ included the limitations found by Ms. Anderson in the final hypothetical question asked of the VE, who opined that a person with those limitations would be unable to work. (R. 532) The ALJ did not reconcile Ms. Anderson's findings, or the VE's opinion incorporating those findings, with the ALJ's contrary determination that O'Connor retains the RFC to work.

In addition, the ALJ failed to conduct a proper *Polaski* analysis in discounting O'Connor's subjective pain complaints. Indeed, even a perfunctory listing of the *Polaski* factors is omitted from the opinion.

In summary, the court finds the ALJ erred in his RFC determination, failed to consider all of the relevant evidence, and failed to support his credibility determination with a proper, full evaluation pursuant to *Polaski*. The Commissioner agrees the ALJ failed to consider O'Connor's functional limitations after October 2000, and requests remand to allow the record to be updated, and to allow the ALJ to evaluate all the evidence of record. O'Connor argues the record already contains evidence to support a finding that she is disabled. Alternatively, she also requests sentence four remand.

The court finds a sentence four remand is not warranted because the record contains substantial evidence that O'Connor is disabled. The remaining question is the onset date of her disability. O'Connor does not address, in her brief, the fact that she was earning wages in excess of the substantial gainful activity threshold through August 2000. "Individuals are ineligible to receive social security disability benefits if they are engaged in 'substantial gainful activity.'" *United States v. Goodson*, 155 F.3d 963, 965 (8th Cir. 1998) (citing 20 C.F.R. § 404.1571). This is true "regardless of the claimant's age, education, prior work activity and even if the claimant is in fact physically or mentally

impaired." *Cooper v. Sec'y of H.H.S.*, 919 F.2d 1317, 1318 (8th Cir. 1990) (citing *Thompson v. Sullivan*, 878 F.2d 1108, 1110 (8th Cir. 1989); *Burkhalter v. Schweiker*, 711 F.2d 841, 843 (8th Cir. 1983); 10 C.F.R. § 404.1520(b)).

However, wages are not the only factor in determining whether work constitutes substantial gainful activity. To determine whether a claimant's work constitutes substantial gainful activity, the Commissioner considers the "amount of pay, length of time worked, and whether the work was conducted in a special work area or with special assistance." *Thompson v. Sullivan*, 878 F.2d 1108, 1110 (8th Cir. 1989). The ALJ noted that although O'Connor's work was subsidized to the extent that she was paid as a nurse's aide while being allowed to perform the duties of an environmental aide, "the evidence shows that her earnings averaged over the substantial gainful employment level, through August 2000, and she was able to perform her duties." (R. 19)

The court agrees that O'Connor's work through August 2000 constituted substantial gainful activity. Although her employer allowed her to reduce the physical requirements of her job, she still was able to perform all of the duties required of her, and she sometimes continued to perform the duties of a nursing assistant. Considered together with her income from the job, these facts support the ALJ's finding that O'Connor was engaged in substantial gainful activity through August 2000, and therefore she was ineligible to receive benefits through that date. However, the court finds the record contains substantial evidence that O'Connor has been disabled since September 1, 2000.

V. CONCLUSION

The court may affirm, modify or reverse the Commissioner's decision with or without remand to the Commissioner for rehearing. 42 U.S.C. § 405(g). In this case, where the record itself "convincingly establishes disability and further hearings would

merely delay receipt of benefits, an immediate order granting benefits without remand is appropriate." *Cline*, 939 F.2d at 569 (citing *Jefferey v. Secretary of H.H.S.*, 849 F.2d 1129, 1133 (8th Cir. 1988); *Beeler v. Bowen*, 833 F.2d 124, 127-28 (8th Cir. 1987)); *accord Thomas v. Apfel*, 22 F. Supp. 2d 996, 999 (S.D. Iowa 1998) (where claimant is unable to do any work in the national economy, remand to take additional evidence would only delay receipt of benefits to which claimant is entitled, warranting reversal with award of benefits). In this case, the court finds the ALJ's decision should be reversed, and this case should be remanded for calculation and award of benefits.

Therefore, for the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[7] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that (1) the Commissioner's motion for sentence four remand be **denied**, (2) the Commissioner's decision finding O'Connor not to be disabled be reversed, and O'Connor be found disabled

[7]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

from and after September 1, 2000; and (3) this case be remanded for calculation and award of benefits for the period from and after September 1, 2000.

IT IS SO ORDERED.

DATED this 20th day of August, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT